No. 16,033

United States Court of Appeals
For the Ninth Circuit

TRADEWIND TRANSPORTATION COMPANY, LIMITED, (Formerly known as Allen Tours of Hawaii, Ltd.),
Appellant,

vs.

BERNICE (TERRY) TAYLOR,
Appellee.

Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLEE.

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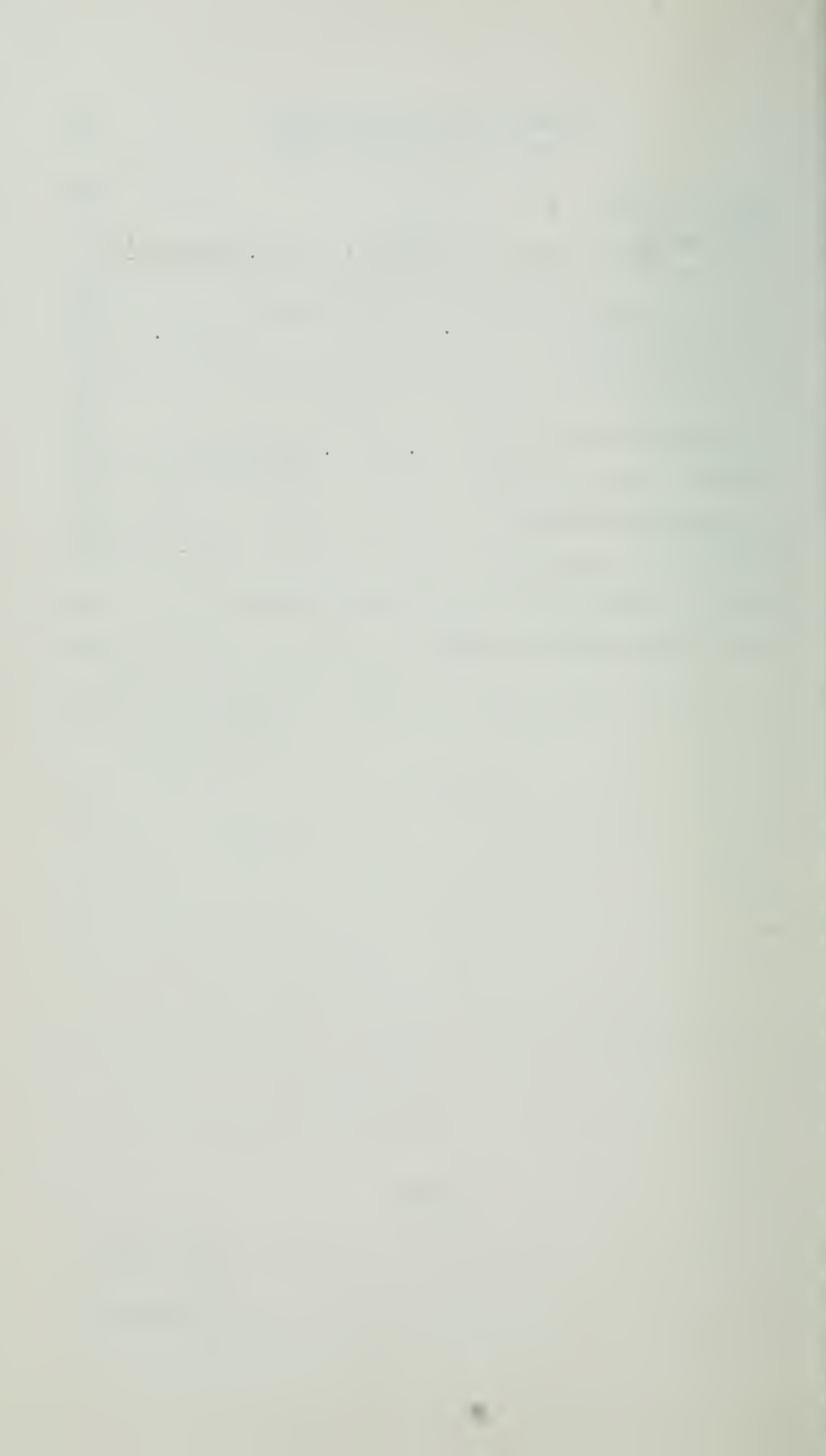

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BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

The statement of fact of appellant is acceptable, so appellee will present no separate statement of facts in this brief. Appellee does, however, wish to comment on three points raised therein:

1. At the bottom of page 8 of its brief, appellant states:

> "He (Pagay) stated on cross-examination that, based upon his observation of the steps at the Temple, they were 'less slippery than concrete steps' . . ."

Appellant fails to point out that Pagay later corrected his testimony in this regard, testifying (record, page 190) that "the tile would be more slippery" than concrete.

2. Appellant on page 9 of its Statement of Facts draws the following completely unwarranted conclusion:

> "There is no evidence in the record to indicate whether at the time Pagay claimed to have seen the unidentified driver slip he was in the employ of appellant."

The record (record, pages 169 to 173) will establish that there was *ample evidence* from which to conclude that Pagay was in the employ of appellant at the time he observed the driver slip. See argument, infra, Section II B.

3. At page 10 of its Statement of Facts appellant states:

> "The customary procedure on a tour of this type was for appellant's driver to deliver the passenger to the location where the point of interest existed."

The fact is that no "customary procedure" was established by the evidence.

SUMMARY OF ARGUMENT.

I.

No Error Was Committed by the Court in Its Rulings Upon the Admission of Evidence.

II.

There Was Ample Evidence to Support the Jury's Verdict.

ARGUMENT.

INTRODUCTION.

Although appellant has set forth ten questions, has made ten specifications of error, and has divided its argument into five separate sections, only two basic questions are raised:

1. Did the trial court err in its rulings upon the admission of evidence?

2. Was there sufficient evidence to sustain the jury's verdict?

All the points argued by appellant were raised in its motion for judgment notwithstanding verdict to contrary and alternative motion for a new trial. The trial court gave careful consideration to all the points raised and denied appellant's motions. The trial court had a comprehensive view of the issues and of the witnesses before it and properly concluded that no error had been committed in the admission of testimony and that there was sufficient evidence to support the jury's verdict. Every negligence case turns upon its own facts, and cases cited by appellant setting forth rulings under different factual situations were properly distinguished by the trial court.

I. NO ERROR WAS COMMITTED BY THE COURT IN ITS RULINGS UPON THE ADMISSION OF EVIDENCE.

A. The testimony of the safety engineer as to his opinion concerning the steps in question was properly admitted.

The Territorial Safety Engineer, Mr. Ebert, testified (record, pages 125 to 130) as to his broad experience in the field of safety engineering, his membership in the American Society of Safety Engineers and his position on the executive committee of the national society.

The admissibility of Mr. Ebert's testimony was a matter within the discretion of the trial judge. See annotation in 38 A.L.R. 2d, page 13, Admissibility of Opinion Evidence as to the Cause of an Accident or Occurrence. At page 19 of this annotation it is stated:

> "In some jurisdictions the admissibility of opinion evidence is almost wholly within the discretion of the trial judge. *In the federal courts this includes not only the qualification of the witness but the acceptability of his opinion as evidence.* 'There is no hard and fast rule governing the allowance of such testimony.' Hartford F. Ins. Co. v. Empire Coal M. Co. (1929, CA 8th Colo) 30 F2d 794." (Italics added.)

This court has followed the same rule in *Pac. Live Stock Co. v. Warm Springs Irr. Dist.,* 270 F. 555. At page 558 the court stated:

> "It was for the court below to determine whether they were qualified to testify. In Stillwell Mfg. Co. v. Phelps Railroad Co., 130 US 520, 527, 9 Sup. Ct. 601, 603 (32 L. Ed. 1035), Mr. Justice Gray said:

'Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial; and his decision of it is conclusive, unless clearly shown to be erroneous in matter of law.'

And in Montana Railway Co. v. Warren, 137 US 348, 353, 11 Sup. Ct. 96, 97 (34 L. Ed. 681) Mr. Justice Brewer said:

'It is difficult to lay down any exact rule in respect to the amount of knowledge a witness must possess; and the determination of this matter rests largely in the discretion of the trial judge.'

That rule was followed by this court in Union Pac. Ry. Co. v. Novak, 61 Fed. 573, 580, 9 CCA 620."

There is sound logic and good common sense behind the rule placing admission of testimony within the discretion of the trial judge. For example in the *Taylor* case at the pretrial conference appellee advised the court that she wished to have the jury view the premises. This was objected to strenuously by the appellant since the Temple steps have been altered after the accident here involved by the application of abrasive strips. The use of abrasive strips was one of the methods of safeguarding the premises later testified to by the safety engineer as a witness for the appellee and also referred to upon cross-examination by the architect who was a witness for the appellant. The court made no ruling at the pretrial conference

but indicated that it was reluctant to allow the jury to view the premises after correction of the defect as prejudicial error might result if the change of conditions were shown. The jury might consider the applying of abrasive strips as an admission of negligence.

During the trial (record, page 246), the formal request for a view was made:

> "Mr. Ingman. Your Honor, I have no further witnesses. At this time I would like to request that the jury be allowed to visit the scene of the accident to view the premises involved.
>
> The Court. Mr. Ingman, I think in view of the evidence that is in the record and other matters about which we are aware (the application of abrasive strips to prevent slipping) that a view of the premises would not be of sufficient assistance to the jury to decide the issues in this case and might also cause a situation where the work up to date has been in vain, so the motion to view will be denied." (Parenthetical matter added.)

The court in its reference to "a situation where the work up to date has been in vain" was obviously referring to the colloquy between court and counsel during the pretrial conference in which the subsequent application of safety abrasive strips had been discussed. The court therefore in allowing expert testimony as to the condition of the premises undoubtedly had in mind that a view of the premises by the jury might result in prejudicial error through their seeing the abrasive strips and that since the jury would be

denied the opportunity to examine the steps in the original condition without abrasive strips, expert opinion evidence should be allowed.

In the following cases expert testimony was allowed to show the condition of stairways:

McCrory's Stores Corp. v. Murphy, 164 S. W. 2d 735;

McStay v. Citizens' Nat. Trust & Sav. Bank, 5 Cal. App. 2d 595, 43 P. 2d 560;

Goldstein v. United Amusement Corp., 86 N. H. 402, 169 A. 587;

Allison v. Doerflinger Co., 208 Wis. 206, 242 N. W. 558.

Appellant also argues that the testimony of Mr. Ebert was improper in that it invaded the province of the jury. In this connection see comment note in 78 A.L.R., page 755, on the subject, Testimony of Expert Witness as to Ultimate Facts. The following is quoted from page 757 of said note:

> "The rule excluding such evidence is predicated on the fallacious theory that it invades the province of the jury. It may be noted, however, that such evidence, which the jury may believe or disbelieve, is no more binding on them than opinion evidence on the evidentiary facts from which they would find the ultimate fact. Furthermore, some ultimate facts in their inherent nature are such that the evidentiary facts to prove the same are unintelligible to any mind except that of the expert, and unexplainable to a person of ordinary experience and skill. It would, therefore, seem to be little less than useless, if not absurd, to require

the expert to testify or state his opinion as to the evidentiary facts, from which the jury would (because of the inherent nature of such facts) be unable to find the ultimate fact, and refrain from stating his opinion, the soundness of which the jury are at liberty to accept or reject, on the very fact in issue. An adherence to the rule excluding the opinion of an expert witness as to the ultimate fact confines the province of such witness largely to a statement or explanation of the scientific and technical processes by which he in his mind reaches a certain conclusion as to the ultimate fact, without stating that conclusion, and leaves to the jury the impossible task of determining that fact from premises of which they are ignorant, perhaps, even after the statements and explanations of the witness."

A comprehensive annotation on the subject here involved is found in 146 A.L.R., page 5, Safety of Condition, Place, or Appliance as Proper Subject of Expert or Opinion Evidence in Tort Actions.

It is clear in the *Taylor* case that the jury could not be expected to reach a conclusion as to the qualities of quarry tile and the degree of slipperiness caused by rain without the aid of expert testimony. The court properly exercised its discretion in allowing opinion evidence on the question of safety under the circumstances.

Other authorities are:

20 *Am. Jur.* 660 (Sec. 786).

"The determination of the question of the competency and qualifications of one offered as an

expert witness is addressed to the judicial discretion of the trial judge before whom the testimony is offered, and his ruling in passing on the qualifications of such proposed expert witness will not be disturbed unless the error is clear and involves a misconception of the law; . . ."

20 *Am. Jur.* 660 (Footnote).

"A decision that a witness is competent will not be reviewed if there is any evidence to support it. *Richard v. Prudential Ins. Co.,* 87 N. H. 31, 173 A. 375, 93 A.L.R. 784; *State v. Brewer,* 202 N. C. 187, 162 S. E. 363, 81 A.L.R. 1424."

20 *Am. Jur.* 661 (Footnote).

"The responsibility for the exercise of the judicial power of determining whether a given witness has the qualifications which will permit him, to the profit of the jury, to state his opinion upon an issue of this kind, may best be left with the judge presiding at the trial, who has a comprehensive view of the issue and of all of the evidence, and the witness himself before his face. *Turner v. American Secur. & T. Co.,* 213 U. S. 257, 53 L. ed. 788, 29 S. Ct. 420."

Appellant appears to place great weight (Appellant's Brief, pages 30 and 31) upon a recent *unreported decision* of Judge McLaughlin in *Fraser v. Matson Navigation Company,* and appends a copy of Judge McLaughlin's oral decision to its brief. It is trite to state again that each case depends on its own peculiar facts. Since the facts are not stated in the opinion and are not of record here this court can find no assistance from the decision. To appellee's knowl-

edge (hearsay) the factual situation in the *Fraser* case was not comparable to the *Taylor* case and no issue was involved as to the effect of water upon the material from which the steps were made.

Appellant at pages 31 to 35 of its brief attempts to set up certain technical requirements which must be met before expert testimony is permissible on the question of safety. Actually the law does not require technical matters such as evidence of standards of custom and usage prevailing in the community. As stated at page 6 in the 146 A.L.R. annotation:

> "Broadly speaking, the rule is that a witness possessing special skill in drawing inferences from data furnished by others or from personal observation and investigation may express his opinion whenever the facts are such that inexperienced persons are likely to prove incapable of forming a correct judgment without such assistance, and that a nonexpert or lay witness may express his opinion where, from familiarity with or personal observation of the subject matter, he has gained a personal knowledge existing in reason rather than facts, which cannot otherwise be fully presented to the jury."

Under the circumstances present in the *Taylor* case the court properly exercised its discretion in allowing the opinion of the Territorial Safety Engineer as to the use of quarry tile on exterior steps. It is significant to note that at *appellant's request* the court gave appellant's requested instruction No. 6 (record, pages 20 and 21) *advising the jury that it was not bound* by opinions of experts. Clearly no error and certainly no

prejudice in view of this instruction resulted from the admission of this expert testimony.

B. No error resulted from the questions asked of the witnesses Lester and Pagay.

The question asked of the witness Lester (Appellant's Brief, page 35) was stricken and the jury was instructed to disregard the question and the answer. It is clear that no prejudicial error occurred. Certainly appellant has not pointed out in its brief how a ruling in its favor could prejudice it.

The argument of appellant on the question asked of the witness Pagay (Appellant's Brief, page 37) is likewise without merit. The witness was uneducated and did not seem to have a good understanding of the English language. Under these circumstances it would appear reasonable and necessary to pinpoint the questions put to the witness. How was appellant possibly prejudiced? Also, the question was asked to clarify testimony of the witness regarding matters contained in a written statement which counsel for appellant declined to produce on the ground it was his own work product. Under these circumstances the court properly exercised its discretion in allowing the question involved.

The duty is on appellant to show not only that there was error but also how these questions prejudiced appellant. Appellant has not so shown.

II. THERE WAS AMPLE EVIDENCE TO SUPPORT THE JURY'S VERDICT.

A. There was substantial evidence that the steps presented an unreasonable risk of harm to appellee.

Appellee concedes that the mere fact she fell on the steps creates no presumption in her favor. However, there was substantial evidence of the existence of an unsafe condition and if there was conflicting evidence the jury had a right to select the evidence it believed more credible. The following abstract of the testimony of Territorial Safety Engineer Ebert (record, page 135) establishes a sufficient basis for the jury's verdict:

> "Q. (By Mr. Ingman.) What are the qualities of quarry tile, if you know?
>
> A. The qualities of quarry tile are such, being a hard surface tile, from the safety standpoint will contribute to slips and falls because of the very nature of the tile, particularly when it is wet."

At page 148 he was asked:

> "Q. (By Mr. Ingman.) Do you have an opinion as to the proper methods of safeguarding the use of this type of tile under the conditions present at 1708 Nuuanu Avenue?
>
> A. Yes, I do."
>
> . . .
>
> "A. My opinion is that any stairway built of the materials used must have an anti-slip treatment given, put on, or they shouldn't use it on the stairs."
>
> . . .
>
> "A. Particularly outside where it is exposed to weather, rain,
>
> Q. And what do you call this treatment?

A. The treatment is such as I have here. This is an all-weather abrasive stripping with an adhesive back. (Showing a piece of abrasive material.)

Q. And where should that be applied?

A. It should be applied to the nosing of the stair. That is, up the front portion."

Mr. Ebert further testified (record, pages 155 and 156):

"Q. (By Mr. Ingman.) Now, Mr. Ebert, with regard to this condition which existed at 1708 Nuuanu in June of 1956, are there any other methods of safeguarding the premises, were there any other methods of safeguarding the premises in your opinion?

A. Yes, there were.

Q. Would you state the method or methods?

A. The accepted method would be the installation of a hand rail."

. . .

"Q. (By Mr. Ingman.) Showing you exhibit 1, where in your opinion would have been the correct place to install a railing in June of 1956?

A. There are three locations. There should be a railing on each side and down the center because of the width of the stairway.

Q. That would be a single railing in each of those three places?

A. A single or double in the center and a single on each side."

Mr. Pagay testified (record, page 190):

"Q. (By Mr. Ingman.) With reference to the concrete and tile at 1708 Nuuanu Avenue, which do you believe to be more slippery?

A. The tile would be more slippery."

Appellant's expert witness, architect Lester, was asked on cross-examination (record, pages 278 and 279):

> "Q. Now, as to the use of abrasives with quarry tile, Mr. Lester, would it be correct to say that the use of quarry tile on outside unprotected areas would be preferable to the use of quarry tile without abrasives?"
>
> . . .
>
> "Q. Well, with specific reference to quarry tile under wet conditions, might this type of abrasive render it safer for use?
>
> A. Under certain conditions it might.
>
> Q. Well, the conditions I am speaking of are outside conditions where the tile becomes wet.
>
> A. I think it would, yes."

Again (record, page 282) Mr. Lester testified:

> "Q. Now, I asked you whether there was any other method other than Plaintiff's Exhibit 7?
>
> A. I know of no other method, unless they add a cement mixture in the tile when they make it.
>
> Q. That is a so-called built-in abrasive?
>
> A. That is correct.
>
> Q. That would render quarry tile less slippery under wet conditions, would it not?
>
> A. If it had a built-in abrasive?
>
> Q. Yes.
>
> A. Yes, it would."

Obviously there was sufficient evidence of a condition presenting unreasonable risk of harm to appellee.

B. There was substantial evidence of knowledge of the defective condition on the part of appellant.

The testimony of appellant's tour driver, Pagay (record, page 169 and following), establishes the fact that his testimony as to a prior slip or slips on the stairs related to the period during which he was in appellant's employ.

> "Q. And when did you start driving as a guide for tours?
>
> A. I think I started about the middle part of April or the early part of April, if I am not mistaken.
>
> Q. 1956?
>
> A. '56.
>
> Q. And during the time that you accompanied the other tour drivers and the time that you drove your own tour, did you stop at the Soto Mission, 1708 Nuuanu Avenue?
>
> A. Correct. We stopped.
>
> Q. And how often during the period from April to June, 1956, would you say you visited those premises?
>
> A. Well, it was a pretty busy month. I think it was a week at least.
>
> Q. And did you ever visit those premises when it had been raining?
>
> A. Yes, sir, many times.
>
> Q. Now, prior to June 13, 1956, had you visited the premises when they were wet?
>
> A. You mean on that date?
>
> Q. Before June 13, had you visited the premises when they were wet?
>
> A. Yes, sir.
>
> Q. What did you observe on these prior occasions that you had visited the premises when the steps were wet?

A. Well, I was fairly new then. I didn't know very much about tours, about telling people to be very careful, until after the accident what Mrs. Taylor had. And ever since then I was very careful about telling people to watch their step when they get off the car or going into buildings.

Q. But going back to the time before her accident, what did you see happen on these days you visited the mission when the steps were wet?

A. I think a few times I myself seen some of the drivers—I can't tell who they are because we have hundreds of them go through the temple—they go outside, independent cabs because we have lots of boats coming in the past couple of years.

Q. You saw some of the drivers what?

A. Slip, not accidentally fall on their back, but just slip and to break their fall they would use their hands."

It is obvious from Pagay's statement, "Well, I was fairly new then," that he is referring to occurrences during the course of his employment with appellant.

Pagay went on to testify (record, pages 172 and 173):

"Q. Now, it still isn't clear to me whether the two or three people you saw fall, that you say you saw fall on those steps were all drivers or part or whether there was one driver and one tourist or other type of person. Would you clarify that?

A. Well, I can't say, sir, because like I said, I seen a lot of drivers up there and people that go on a tour, and I seen them actually slip.

Q. Well, now, what do you mean by 'slip'?

A. Well, coming down the stairways, I'd say they would miss the balance or, you might say,

misbalance and just have the shoes at the end of his heel that would slip and he would get himself unbalanced so he just fall on his side. He use his hands then for a brace."

. . .

"Q. (By Mr. Ingman.) Just how did the people you observe fall, if there were more than one way of falling, describe the separate types of falls which occurred.

A. You would like me to answer that, sir?

Q. Yes.

A. Well, actually, I seen one of the drivers fall sideways. I won't say fall from his back but slip and misbalance sideways. A man would be on his left——

Q. How did he land?

A. With his hands, sir. He had his hands as his protection. I mean his brace, I would say."

It is well established law that *konwledge of the employee is knowledge of the principal when obtained during the scope of his employment,* 1 Restatement of Agency, Sec. 232. In the first example given in that section, an employee who failed to warn an adjoining landowner of a fire breaking out on premises being guarded by the employee was held to be acting in the scope of his employment. His failure to warn the adjoining landowner was held to render his principal liable to the landowner to whose premises the fire spread. The California, Massachusetts and Michigan annotations follow the rule of Sec. 232.

A case very close to the *Taylor* case is *Teche Lines v. Keyes,* 193 S. 620, 187 Miss. 780, which is the subject of an annotation at 126 A.L.R. 1084. In the *Teche*

case a passenger on a motorbus was injured as a result of the defective condition of a roadway owned by a government agency. The defective condition consisted of a soft spot in the road at a particular location, the existence of which was unknown to the driver of the bus on the date in question. However, another driver of defendant bus company testified that he had learned of the dangerous place and made a practice of veering to the center of the road to avoid it. The court held that the discharge of the highest degree of care consistent with the practical conduct of the business of the bus company required that it secure reports of road conditions from its drivers to be passed along to drivers using the same route, *overruling the contention of the bus company that it had no knowledge of the defective condition and in any event could not be liable for the defective condition of another's property.* In the *Taylor* case we have much stronger evidence from the plaintiff's standpoint. As in the *Teche* case the dangerous condition of another's property is involved but instead of the knowledge of another driver of the tour company, we *have the knowledge of the same driver* who was in charge of the tour on the date of the accident.

F. W. Woolworth Co. v. Carriker, 107 F. 2d 689 (C.C.A. 8th 1939), cited by appellant at pages 38 and 39 of its brief, can be distinguished. That case involved a temporary dangerous condition resulting from a wet floor, a different type of case from *Taylor.* The holding of the *Woolworth* case is that knowledge of a slippery condition acquired shortly before the accident by a baker employed by defendant was not

obtained during the course of his employment as he had observed the condition while passing through the premises before dawn en route to the department in which he was employed. This situation is distinguishable from that involving a tour driver *in charge* of a tour party. The most common method by which a tour company would acquire knowledge of the dangerous condition of premises visited by its tours would be through the observation of conditions by the drivers while actually conducting the tours and escorting patrons to places of scenic interest.

The jury by its verdict found that Pagay learned of the condition within the scope of his employment. The trial court in passing upon appellant's motions before and after the verdict found there was sufficient evidence of this fact.

Whether the agent was acting within the scope of his authority or employment was a question of fact for the jury. 2 *Am. Jur.*, Agency, Sec. 454, states the law as follows:

> "It is the settled, general rule that the question of the scope and extent of the agent's authority is to be decided from all the facts and circumstances of the evidence, *and is to be determined by the triers of the facts.*" (Italics added.)

C. The fact that the injury occurred on property owned by a third person does not relieve appellant from its liability for failure to warn of the dangerous condition.

The general rule with regard to the liability of a carrier for injuries occurring on premises not owned or controlled by the carrier is set forth at 10 *Am. Jur.*, Sec. 1288:

> "With respect to the liability of a common carrier of passengers for injuries caused by defective premises not owned or controlled by the carrier, the general principle has often been applied that one who, *although not strictly in control of a defective agency or dangerous place, uses it for his own benefit or for his own purposes and invites another to make use of the same may be held liable to the latter for an injury caused by the defect or danger."* (Italics added.)

An annotation on one phase of this subject is found at 41 A.L.R. 2d 1286. At page 1305, Sec. 10 thereof, are listed five cases recognizing the liability of a bus company for injuries to passengers at stations along its route notwithstanding the lack of ownership of the premises involved by the bus company and notwithstanding its lack of knowledge of the dangerous condition. Related cases are *McBroom v. Greyhound Lines,* 193 S. W. 2d 92 (bus passenger injured on property not owned by bus company), and *Watts v. Colonial Stages,* 163 S. E. 523 (incorrect directions as to location of restroom located on premises not owned by bus company). Related annotations are 9 A.L.R. 2d 938, 946 (condition of place where passenger discharged), 35 A.L.R. 757 and 61 A.L.R. 403 (passenger temporarily leaving train) and 33 A.L.R. 820 (detour—condition of station of another carrier).

Horelick v. Pennsylvania Railroad Company, 13 N. J. 349, 99 A. 2d 652 (1953), is a leading case. In a unanimous opinion the court held that the liability of a railroad company after completion by plaintiff passenger of his journey exists, notwithstanding that

the injuries were received by the plaintiff after alighting from the train *on an icy platform neither owned nor controlled by the defendant company.*

A point which should be emphasized in connection with cases holding a carrier liable for injuries received by passengers on another's property is that *the great majority of these cases do not even consider the issue of knowledge on the part of the defendant carrier* or its employees. In other words the basis of liability is that the carrier owes a high duty to its passengers and is therefore liable for any condition of which it knew or should have known. On the other hand the appellee in the Taylor case did not urge at trial such an extensive liability to exist on the part of appellant but submitted the matter on a theory more favorable to appellant, simply on the question of actual knowledge of the appellant or its authorized employee.

Hotels El Rancho, Inc. et al. v. Pray, 187 P. 2d 568, 64 Nev. 591, a *non-carrier* case, emphasizes this distinction. From a plaintiff's standpoint *Pray* is not as strong a case as Taylor, since there was no evidence there of actual notice of the dangerous condition on the part of defendant or its employees. Notwithstanding the fact that the defendant in the *Pray* case was not a carrier, the legal principles involved are strikingly similar to those involved in the Taylor case.

In the *Pray* case the plaintiff sued Hotel Last Frontier and others to recover damages for the death of plaintiff's son in a cross-country race. The jury brought in a verdict against the Hotel Last Frontier

who raised the point on appeal of lack of ownership of the premises where the injuries occurred. The owners of the Hotel Last Frontier had for some time prior to the date of the accident been promoting cross-country races for the purpose of advertising the hotel. They contended that they had no contractual or other relationship with the owner of the property and were themselves *trespassers* against the true owner on the date of the accident. The court held that the owners of the Hotel Last Frontier had invited the deceased onto the premises and therefore owed a duty to warn of defects of which they knew or should have known. There was no evidence that the defendants or their employees knew of the dangerous condition and there was strong evidence from which the jury could have concluded that the deceased was in a better position to learn of the dangerous condition than the defendants. However, notwithstanding their *lack of knowledge of the dangerous condition,* defendants were held liable. The holding of the *Pray* case is merely a logical application to a non-carrier case of the holdings of the numerous cases in which carriers have been held responsible for injuries to passengers on another's property, notwithstanding lack of actual knowledge on the part of the carriers or their employees.

It therefore appears reasonable that under the majority rule applied in the carrier cases, and in the *Pray* case, appellee could have obtained an instruction by the court in the Taylor case that the appellant could be liable if it knew or *should have known* of

the dangerous condition. Since appellee did not request such an instruction appellant cannot complain. *The court's instructions on the liability of the appellant as given were therefore favorable rather than prejudicial to the appellant.* (See record, pages 39 and 40.)

The *Pray* case is cited favorably in *Watford v. Newspaper Co.,* 211 F. 2d 31, a case involving injury to spectators at a soap box race held on public property.

Another case in point is *Zerner v. Cohen,* 87 N.Y.S. 2d 342. The plaintiff's action in the *Zerner* case was against a husband and wife. The husband was the owner of the property where the dangerous condition was alleged to exist. The trial court dismissed the action as to the defendant wife on the ground that only the owner of the premises could be liable for the defective condition. On appeal the court reversed, holding that the issue of the wife's liability for failure to warn should have been submitted to the jury since liability did not depend on ownership of the property.

Appellant at page 52 of its brief emphasizes certain language re possession and control from *Rouillard v. Canadian Klondike Club,* 54 N. E. 2d 680. In the *Rouillard* case there was no evidence that the defendant had used the premises previously, no evidence that the defective condition existed prior to the date of the accident and no evidence of any knowledge of the defective condition on the part of the defendant prior to that date. The case is clearly distinguishable from Taylor. The same is true as to the *Pierce* and *Pick-*

wick cases (page 50, Appellant's Brief). In neither of these cases was there any evidence of notice to defendant or its employees of any dangerous condition.

Collins v. Hazel Lumber Co., 103 P. 798, 54 Wash. 524, is another holding consistent in its reasoning with the *Horelick* and *Pray* cases. The court stated at 103 P. 800:

> "The mere fact that the appellant was a trespasser as to the owner of the land, or that persons traveling over the way were trespassers as to the true owner, did not make such persons trespassers as to appellant. As between the appellant and persons lawfully upon the highway, the appellant, under the conditions shown, was as clearly liable to his invitees as though it owned the land. *This proposition is elementary. After appellant has invited persons upon premises not its own, it cannot be heard to say to its invitees, who did not know the facts, 'I had no legal right to invite you there,* and am therefore not liable for my negligence in not maintaining a reasonably safe place for you.' " (Emphasis added.)

CONCLUSION.

The facts of every negligence case are, of course, different, and each case must be decided upon its own peculiar facts. The basic principles of law upon which the instant Taylor verdict should be sustained are that:

1. It is negligence not to warn persons of *known defects and dangerous conditions.*

2. The knowledge of an employee of a known defect and dangerous condition obtained within the scope of his employment is the knowledge of his employer.

As stated, the basic issue before this court is whether there was *sufficient evidence,* more than a mere scintilla, *to justify the verdict.* Appellee believes that the evidence was not only sufficient but in many respects conclusive. The issue of the existence of a dangerous condition was submitted to the jury on conflicting evidence and appellant should not now be permitted to argue that there was no evidence of a dangerous condition. The prior knowledge of appellant's employee, Mr. Pagay, obtained during the course of his employment on a previous visit to the temple, was submitted to the jury for its consideration. The jury by its verdict found that this employee had learned of the dangerous condition *in the course of his employment.* The other element of appellee's case, failure to warn, was admitted by the tour company.

The court completely and correctly submitted to the jury the issue of the liability of the tour company (appellant) to Mrs. Taylor (appellee) (record, pages 39 and 40 and page 24):

> "If you find by a preponderance of the evidence that a condition involving an unreasonable risk of harm existed at 1708 Nuuanu Avenue on June 13, 1956, that defendant tour company's employee learned of said condition in the course of his employment prior to that date but failed to warn plaintiff, and that said condition was the

proximate cause of plaintiff's injury, then you should find for the plaintiff and against defendant tour company, irrespective of what you may find as to the liability of defendant mission."

"The defendant's, Allen Tours of Hawaii, Ltd., only duty to the plaintiff with regard to the steps of the Soto Mission did not constitute a hazard-the plaintiff of the existence of a dangerous condition known to defendant Allen Tours of Hawaii, Ltd., or its authorized employee and unknown to the plaintiff. If you find that the steps of the Soto Mission on June 13, 1956, was to warn ous condition, then your verdict must be for both defendants.

"Before you may find against the defendant Allen Tours of Hawaii, Ltd., you must find that hazardous condition existed, that said defendant or its authorized employee had actual knowledge of the condition, and that the condition was not apparent to a reasonably prudent person observing the same. If defendant Allen Tours of Hawaii, Ltd., had no knowledge of this condition, or if the condition was apparent to a reasonably prudent person, then you cannot render a verdict in favor of the plaintiff against the defendant Allen Tours of Hawaii, Ltd."

Under the authorities cited this was a proper statement of the law; under the evidence the jury was justified in finding and must have found that a dangerous condition existed, that an authorized employee of appellant had learned of that condition in the course of his employment prior to the date of the accident, and that he had failed to warn appellee of

said condition. The trial judge after extensive arguments and review of all the facts came also to this conclusion in denying the motion for judgment notwithstanding the verdict to contrary and alternative motion for a new trial.

The judgment should be affirmed.

Dated, Honolulu, Hawaii,

September 24, 1958.

Respectfully submitted,

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